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No. 87-1619

In The

Supreme Court of the United States

October Term, 1987

Norwest Bank Watertown, N.A.
formerly First National Bank of Watertown
Jerry Miller, Vice President of Norwest Bank
Watertown, N.A.; Thomas Green, Attorney for Norwest
Bank Watertown, N.A.,
Appellants,
v.
Watertown Equipment Company and
Edward Moe, Jr.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether South Dakota's prejudgment attachments statutes were unconstitutional?

2. Whether an attorney is entitled to qualified immunity when he implemented prejudgment attachment statutes which clearly lacked procedural safeguards required by the Constitution and previously recognized by this Court?

3. Whether an attorney who suggested the use of prejudgment attachment and actively participated in each step of the proceeding is acting under the color of state law for the purposes of § 1983 liability?

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MOTION TO DISMISS OR AFFIRM

For the sake of brevity Appellees incorporate by reference Appellants' Opinions Below, Appendix, and Constitutional and Statutory Provisions. Appellees agree with Appellant Green's JURISDICTION, except Appellees do not agree that jurisdiction is conferred by 28 U.S.C. § 1254(2) (see Argument I herein), nor do they agree that Attorney Green was acting just "at his client's direction."

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the Appellees, Watertown Equipment Company and Edward Moe, Jr., move to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Eighth Circuit. The motion is grounded on the fact that the questions on which this decision is based are so unsubstantial as not to need further argument.

STATEMENT OF CASE

Appellant Norwest Bank Watertown, N.A. and Appellant Jerry Miller filed a Notice to Appeal herein but neither Appellant has yet to file a jurisdictional statement. This statement of case and the subsequent discussion will deal primarily with Appellant Thomas Green. It is necessary to discuss Appellant Norwest Bank and Miller on occasion simply to give a more appropriate background of the case.

From approximately 1976 until 1982, Defendant/Appellant Norwest Bank Watertown, N.A., (hereinafter "Bank") and Plaintiff/Appellee Watertown Equipment Company (hereinafter "WEC") transacted a series of loans. Plaintiff/Appellee Edward Moe, Jr., (hereinafter "Moe") was WEC's major stockholder. Even though, from time to time, Moe and WEC had trouble meeting their obligations with the bank, the bank had mortgages and security on other major land holdings of the Plaintiff, including real estate, buildings, farm land, car dealership building, etc. The bank and the Plaintiffs enjoyed a close working relationship in attempting to reduce the loans. Daniel Tobin, who was the manager at Watertown Equipment Company, and others made a proposal to purchase the operating part of the company in or about late September, 1982.

Contrary to what Appellant Thomas Green (hereinaf-

ter "Green") has alleged in his jurisdictional statement herein, Tobin signed an affidavit (which was part of the 8th Circuit file) which stated that he never told anyone from the bank that any suspect practices were ever going on at Watertown Equipment company in 1982. In fact, in depositions taken of the primary bank officers, the bank admits that it had no reason to believe suspect practices were going on. The bank never made a written demand on WEC or Moe for immediate payment of the loans and Moe never refused to make payments. The bank never initiated any kind of outside check or investigation concerning either WEC or Moe, nor did the bank ever request a certified audit.

Sometime in early October, attorney Green suggested to the bank that they pursue a prejudgment attachment action against WEC. Prior to the attachment of WEC, the bank was not even aware that such an unusual ex parte remedy existed. Green researched the potential unconstitutionality of South Dakota's attachment statutes and found that other similar prejudgment statutes had been found unconstitutional by various state and federal courts. Green discussed the unconstitutional ramifications with the bank. The bank did not seek another opinion nor did they question further of Green. In addition to his oral communication with the bank, Green delivered to the bank an opinion letter (an unusual move as far as the bank was concerned, since Green had handled other matters for the bank and had not made it a practice to reduce his comments to writing). All the major officials of the bank admitted that they knew about the potential unconstitutionality of South Dakota's attachment statutes, but they agreed with Green to commence this drastic measure. The bank and Green were aware that the prejudgment attachment would cause great and immediate harm to its customers and the Plaintiffs. On October 25, 1982, (1) Green secured a writ from the county Clerk of Courts with no judicial supervision; (2) Green obtained the writ with a

summary (boiler plate) affidavit; (3) no notice was given to Moe or WEC; (4) only a $10,000.00 bond was posted.

Attorney Green and the bank were joint participants, along with the county sheriff, in the attachment procedure. In particular, Defendant Green (1) made the decision to draft the writ of attachment to include a signature line for the Clerk of Courts, rather than using a procedure that would require judicial supervision; (2) delivered the writ to the Clerk of Courts office for filing and execution; (3) delivered the documents to the sheriff to have the attachment put in motion; (4) wrote and delivered a letter to the sheriff, directing him as to how to carry out the attachment; (5) accompanied the sheriff to Watertown Equipment Company when they closed the business and locked the doors; (6) jointly participated with the sheriff in advising the manager of Watertown Equipment Company as to the effect of the attachment and what it was that Green, the bank, and the sheriff were doing; (7) had the idea for attachment and communicated the idea to the bank; (8) researched and knew of the potential unconstitutionality of the statute but advised the bank to act anyway; (9) wrote a letter to the bank about the potential for risk (an unusual step); (10) drew the boiler plate affidavit and the writ of attachment; (11) notarized the boiler plate attachment.

On October 25, 1982, officers of the First National Bank in Watertown along with their lawyer Green, accompanied the sheriff of Codington County and a corps of deputies to the premises of the Watertown Equipment Company. At that time, the sheriff and deputies "attached" all of the real and personal property of Watertown Equipment Company and placed the same under lock and key. The deputies continued to occupy and guard the property for months.

In the attachment process, the sheriff and deputies

secured not only the equipment and real property owned by Watertown Equipment Company, but also the equipment owned by customers; work in process; accounts receivable; money and bank accounts; and hundreds of thousands of dollars of property floor planned by WEC to other implement and supply companies. The company was paralyzed and, of course, destroyed. Contrary to the inference raised in the Appellants' jurisdictional brief, WEC had more equipment in its possession belonging to other dealerships than vice-versa.

Green not only acted as a legal counsel to the bank, he also basically did the sheriff's job for him. It was obvious that the sheriff was only along because Green didn't have a badge. Green even wrote a letter to the bank in which he implied that the local judge would not have the nerve to declare the statute unconstitutional and that Moe and WEC would be forced to appeal if they wanted a declaration of unconstitutionality. Now in his jurisdictional statement, attorney Green expresses surprise at the fact that the courts have ruled that the statute was unconstitutional, and clearly so.

In August of 1984, Moe and WEC brought a 42 USC 1983 action against the bank, one of its officers and Green. In September of 1985, Green moved for and was granted summary judgment by the District Court and in October of 1986 the bank and its officer moved for and were granted summary judgment. On October 8, 1987, the Eighth Circuit Court of Appeals reversed both district court decisions on the summary judgment, holding that the attachment statutes in South Dakota were unconstitutional and, further, that a fact question existed as to whether Green was acting under color of state law. On October 29, 1987, Green petitioned for rehearing and rehearing en banc. On December 23, 1987, the Court of Appeals entered an order denying the petition.

ARGUMENT

I.

SOUTH DAKOTA'S PREJUDGMENT ATTACHMENT STATUTES WERE UNCONSTITUTIONAL.

Appellant Green fails to directly address the issue of whether the attachment statute was unconstitutional. Instead, Green has tried to present the § 1983 qualified immunity issue under the guise of a proper appeal in accordance with §1254(2). Green's failure to candidly address the "State statute held by a Court of Appeals to be invalid as repugnant to the Constitution" subjects him to dismissal as he has failed to properly invoke the jurisdiction of this Court.

The issue that invokes the jurisdiction of this Court under §1254(2) is the Court of Appeals' decision which held South Dakota's attachment statutes unconstitutional. Four cases from this Court have established the guidelines for determining the constitutionality of state prejudgment seizures of debtor's property. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment procedure violated the fundamental principles of due process); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment replevin statutes unconstitutional); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (sequestration statute provided adequate procedural safeguards including judicial supervision); *North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (prejudgment garnishment statute unconstitutional due to lack of judicial supervision and prompt postgarnishment hearing).

The Court of Appeals concluded that these four Supreme Court decisions point to five primary factors: (1) an

affidavit which contains facts alleged by a person with knowledge; (2) an opportunity for the debtor to dissolve the writ by posting a bond; (3) an early post-deprivation hearing at which the creditor bears the burden of proving the legality of the writ; (4) indemnification of the debtor for a wrongful attachment; and (5) judicial supervision of the attachment process.[1] The Court of Appeals applied these factors to the South Dakota attachment statutes and determined that the statutes did not provide for judicial supervision or an adequate creditor's bond. The Court held that without these essential procedural safeguards the attachment statutes were unconstitutional.

This Court and lower courts have consistently recognized the importance of active judicial participation to aid in minimizing the improvident use of a writ. *Mitchell*, 416 U.S. at 616-17; *Guzman v. Western State Bank*, 516 F.2d 125, 130-31 (8th Cir. 1975); *Johnson v. American Credit Co.*, 581 F.2d 526, 534-35, n. 16 (5th Cir. 1978). Green creates an imaginary conflict in his discussion of judicial supervision. In the two maritime cases, the courts recognized that maritime needs and requirements differ substantially from those in the commercial context of the *Sniadach* line of cases. Additionally, both courts determined that the maritime prejudgment attach-

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1 These factors were also recognized in *Lewis Service Center, Inc., v. Mack Financial Corp.*, 696 F.2d 66, 68 (8th Cir. 1982), a case decided on December 27, 1982, just a couple of months after the attachment in this case. The district court stated that "had the *Lewis* decision been on the books prior to the action in this case, it's the view of the Court that there probably would be an issue of fact . . . whether . . . Defendant Green knew or should have known that . . . the attachment statute was unconstitutional." The Eighth Circuit believed that earlier cases such as *Guzman v. Western State Bank* and *Mitchell*, which both considered prejudgment attachment, are as or more instructive than *Lewis*, which considered a replevin action under a Nebraska statute.

ment cases presented the "extraordinary situation" referred to in *Fuentes* wherein the attachment was necessary to secure jurisdiction. *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 640 (9th Cir. 1982); *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528, 1537 (11th Cir. 1985) (both cases citing *Fuentes*, 407 U.S. at 91 n. 23).

Green also cites a postjudgment garnishment case in which the issuance of the writ by a court clerk was acceptable as the judgment had been entered. However, the court stated that the lack of judicial review was a "substantial defect." *Brown v. Liberty Loan Corp.*, 539 F.2d 1355, 1369 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977). Lastly, Green mistakenly states that Pennsylvania's foreign attachment statutes were upheld in *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123 (3d Cir. 1976). Actually, the court held that the Pennsylvania procedures provided insubstantial protection to the debtor against wrongful attachment. *Id.* at 1129. The court also stated that judicial participation in the writ process affords a greater opportunity that the requisite determinations for attachment will be made. *Id.* at 1130, n. 15. As can be ascertained from this account of the cases cited by Green, there is not a conflict among the Courts of Appeals which would require this Court's time and attention.

The Court of Appeals found that the creditor's bond provided wholly inadequate indemnification of the debtor in case of a wrongful attachment.[2] Green fails to mention that

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2 Green refers to the common law remedy for wrongful attachment. *Slaughter v. Nolan*, 41 S.D. 134, 169 N.W. 232 (1918). This remedy coexists with the § 1983 action. Further, it is not a substitute for the debtor's right to due process safeguards guaranteed by the Constitution. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934-35 (1982); *Buller v. Buechler*, 706 F. 2d 844, 850-51 (8th Cir. 1983).

the statute only required a maximum bond of $10,000.00. S.D. Codified Laws Section 21-17-4 (1967). Thus, the defendant is only protected from the plaintiff's wrongful attachment for damages up to $10,000.00. By the Bank's own estimate, the property which was attached at WEC had a fair market value of between $275,000 and $300,000. This attachment brought all business at WEC to a "screeching halt" and the attachment was maintained on the property for several months. (Jur. A-15). Clearly, this bond falls painfully short of the constitutional safeguard of assuring that the "prevailing party is protected against all loss." *Mitchell*, 416 U.S. at 619.

The Court of Appeals also correctly found that the post-deprivation hearing and the posting of a debtor's bond were inadequate safeguards which did not make up for the lack of other crucial safeguards. The Court noted that even if WEC had immediately requested a hearing, the damages for the loss of business, harm to reputation, and attorney's fees would have far exceeded the $10,000 creditor's bond. Further, the debtor's bond requirement was a meaningless protection as it required the debtor to pay plaintiff on demand the amount of any judgment which for WEC would have been $488,000. How could WEC post a bond when Green and Norwest had all of his property locked up?

The Court of Appeals properly held that the South Dakota attachment statutes were unconstitutional. The decision follows this Court's own prior case law. The Court of Appeals merely adopted and applied the guidelines set forth by this Court over ten years ago. Subsequently, these factors have been implemented by the lower courts and have successfully stood the test of time.

Finally, it is significant to note that the attachment statutes involved in this appeal were repealed by the South Dakota legislature in 1983 and the replacement statutes are

not at issue. Therefore, this solitary case, dealing with a since repealed statute, is not likely to recur and, as such, is not of significant importance to warrant this Court's attention.

II.

AN ATTORNEY IS NOT ENTITLED TO QUALIFIED IMMUNITY WHEN HE IMPLEMENTED PREJUDGMENT ATTACHMENT STATUTES WHICH CLEARLY LACKED PROCEDURAL SAFEGUARDS REQUIRED BY THE CONSTITUTION AND PREVIOUSLY RECOGNIZED BY THIS COURT.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court noted the problem of holding private individuals liable for invoking seemingly valid, but consitutionally infirm, state laws. The majority and the dissent agreed that a possible solution would be the availability of a qualified immunity defense. *Id.* at 942 n. 23, 956 n. 14. Since that time at least three Courts of Appeals have followed the suggestion of this Court and have held that such immunity exists for private parties. *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983); *Folsom Investment Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982); *Jones v. Preuit & Mauldin*, 808 F.2d 1435 (11th Cir. 1987). To gain the protection of qualified immunity, the defendant must show that he did not violate clearly established law of which he knew or should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Court of Appeals applied this objective test and reviewed well-settled case law on prejudgment procedures. The Court found that an entire business was permanently closed and property valued at several hundred thousand dollars was taken by a process which did not proceed under judicial management and which did not provide an adequate

bond for the protection of the debtor. The Court then reached the only fair and correct conclusion— "This procedure clearly was not constitutionally acceptable in 1982 when the attachment in this case occured." (Jur. A-17)

III.

AN ATTORNEY WHO SUGGESTED THE USE OF PREJUDGMENT ATTACHMENT AND ACTIVELY PARTICIPATED IN EACH STEP OF THE PROCEEDING IS ACTING UNDER THE COLOR OF STATE LAW FOR THE PURPOSES OF SECTION 1983 LIABILITY.

The Court of Appeals held that the determination of whether Green acted under color of state law was a factual question to be decided on remand. Obviously, the color of state law issue raised by Green on this appeal depends on the particular facts of this case alone and is of interest only to the parties in this action. Essentially, Green is asking this Court to make the factual determination on an issue that was properly remanded by the Court of Appeals.[3]

In implementing the use of an attachment statute which was clearly unconstitutional, Green went far beyond "merely advising his client and instituting proceedings at the client's direction." The idea of a prejudgment attachment originated with Green. Thereafter, he participated in every

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3 Green asserts that this issue was not raised or addressed in his brief. A party must be acting under color of state law to be a proper defendant for a §1983 action; thereafter, the defendant is entitled to assert the affirmative defense of qualified immunity. *Buller*, 706 F.2d at 850. By failing to address this issue and asserting and briefing the affirmative defense of qualified immunity, Green has possibly waived this inquiry and made an admission that he was acting under the color of state law.

step of the procedure including: writing and delivering a letter to the sheriff explaining how to carry out the attachment; accompanying the sheriff to WEC when they closed the business and locked the doors; and assisting the sheriff in explaining to the manager of WEC the effect of the attachment. In summary, Green's joint participation far exceeded that of the defendants in *Lugar*. Green engaged in joint activity with the State and its agents to secure the application of a state law so "plainly unconstitutional as to enjoy no presumption of validity." *Lugar*, 457 U.S. at 955 (Powell, J. dissenting).

Additionally, Green is attempting to create an "open and unanswered" question of an issue which has already been addressed by this Court. In previous cases, this Court has held that private parties are amenable to suit under Section 1983 when acting in "joint participation" or "conspiracy" with state officials in the violation of constitutional rights. *See, e.g., Adickes v. S. H. Kress Co.*, 398 U.S. 144, 152-53 (1970); *United States v. Price*, 383 U.S. 787, 794 (1966). This Court has explicity noted that in the case of prejudgment attachment the test is a private party's "joint participation" with state officials in the seizure of disputed property. *See Lugar*, 457 U.S. at 939-42; *Flagg Brothers Inc., v. Brooks*, 436 U.S. 149, 157 (1978). The Court of Appeals correctly adopted this standard as follows: "In attachment proceedings and other cases, as the Supreme Court established in *Lugar*, the key is 'joint participation' with state officials in depriving someone of his or her constitutional rights." (Jur. A-22). Thereafter, the Court of Appeals remanded the factual question for consideration at the district court level.

The "joint participation" test adequately protects an attorney who is simply performing a lawyer's traditional function as counsel. *See, e.g., Polk v. Dodson*, 454 U.S. 312, 325

(1981). This test also fairly determines when a private party, including an attorney, is a willful participant in joint activity with the State or its agents.[4] Green seems to urge that an attorney is entitled to a special test in this narrow situation. It is clear that an attorney is a private party and special treatment in the form of yet another "test" to determine color of state law is not only unnecessary in light of this Court's decisions, but would also unduly complicate and confuse this area of the law.[5]

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4 Contrary to Green's belief (Jur. p. 16), the court in *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983) implemented the "joint participation" test to determine that the defendants, including attorney Buechler, were acting under color of state law. *Id.* at 849-50.

5 The *Lugar* court noted that a number of different factors or tests already existed for this fact-bound inquiry. *Lugar*, 457 U.S. at 939.

CONCLUSION

For the foregoing reasons, Appellees respectfully move the Court to dismiss the appeal, or, in the alternative, to affirm the judgment entered by the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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